No. 03-1566

Supreme Court, U.S.
FILED
JAN 7 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents,

WESTLANDS WATER DISTRICT,
Plaintiff Intervenor-Respondent,

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Defendant Intervenors-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR INTERVENORS–RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, *et al.*

PHILIP F. ATKINS-PATTENSON
SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP
4 Embarcadero Center, Suite 1700
San Francisco, CA 94111
(415) 434-9100

Attorneys for Intervenors-Respondents

HAMILTON CANDEE
MICHAEL E. WALL
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 20th Floor
San Francisco, CA 94104
(415) 875-6100

Attorneys for Intervenors-Respondents Natural Resources Defense Council et al.

MICHAEL RUBIN
Counsel of Record
LINDA LYE
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Attorneys for Intervenors-Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether recipients of reclamation water may bring a suit for damages in federal district court against the United States, based on the Bureau of Reclamation's alleged breach of a reclamation contract to which the water recipients are not parties.

STATUTORY PROVISIONS INVOLVED

The sovereign immunity waiver section of the Reclamation Reform Act of 1982, 43 U.S.C. §390uu, is reprinted in Pet. App. 47a.

LIST OF PARTIES

The plaintiffs and appellants below, petitioners here, are Francis A. Orff; Brooks Farms II; Brooks Farms IV; Brooks Farms V; G.S. Farms; Five-D Westside Farms, Inc.; R&S Farming; Cardella Ranch; Gramis Family Farms II; Edwin R. O'Neill, BRO Partnership; BTO Partnership; EJC Partnership; ERO Partnership; JEO Partnership; SLO Partnership; TBO Partnership; C.S. Stefanopoulos Trust; Elena Stefanopoulos Trust; Estate of Elena Stefanopoulos; D.D. Stefanopoulos Trust; Pagona Stefanopoulos; Sumner Peck Ranch, Inc.; Y. Stephen Pilibos; and Pilibos Children's Trust.

The defendants and appellees below, respondents here, are United States of America; United States Department of the Interior; Bureau of Reclamation; Fish and Wildlife Service; United States Department of Commerce; National Marine Fisheries Service; Ronald H. Brown, Secretary of Commerce; and Bruce Babbitt, Secretary of Interior.

Parties who intervened below as defendants and appellees, also respondents here, are Natural Resources Defense Council; United Anglers of California; Save San Francisco Bay Association; Sierra Club; Bay Institute of San Francisco; Environmental Defense Fund; California Striped Bass Association; Trout Unlimited of California; Sacramento River Council; California Sportfishing Protection Alliance; Pacific Coast Federation of Fisherman's Associations; and The Wilderness Society.

Westlands Water District, respondent here, intervened in the Court of Appeals as an appellant.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATUTORY PROVISIONS INVOLVED	ii
LIST OF PARTIES	iii
TABLE OF AUTHORITIES	viii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	13
ARGUMENT	14
I. THE UNITED STATES HAS NOT CONSENTED TO BE SUED IN DISTRICT COURT BY INDIVIDUAL WATER USERS SEEKING DAMAGES FOR ALLEGED BREACHES OF THE BUREAU'S RECLAMATION CONTRACTS	14
A. The United States Has Not Been Joined As a Necessary Party Defendant	15
B. Congress Has Not Unequivocally Authorized a Damages Remedy	20
C. Petitioners Cannot Overcome The Bar of Sovereign Immunity by Asserting Third-Party Beneficiary Status	22
II. PETITIONERS MAY NOT SUE FOR CONSEQUENTIAL DAMAGES AS THIRD-PARTY BENEFICIARIES OF THE 1963 CONTRACT	23

TABLE OF CONTENTS—Continued

Page

A. A Direct Action For Consequential Damages by a Third Party to a Government Contract Can Only Proceed if Consistent With The Contracting Parties' Intent and The Laws Under Which The Contract Was Executed 24

B. Allowing Third-Party Damages Claims Against The United States Is Inconsistent With Federal Reclamation Policy 30

C. Allowing Third-Party Damages Claims Against The United States Is Contrary To The Contracting Parties' Intent As Manifested In The 1963 Contract 33

1. A Direct Action By Petitioners Against The United States Is Inconsistent With The Exclusive Exchange Of Performance Obligations Between The Bureau And The District 33

2. A Direct Action By Petitioners Against The United States For Consequential Damages Undermines The Parties' Intent To Limit The Bureau's Contract Liability 35

D. Petitioners Have No State or Federal "Right" To Reclamation Water That Requires a Different Analysis Of Their Third-Party Beneficiary Status 38

1. Ownership Of All Or A Portion Of The Contract *Res* Does Not By Itself Confer Intended Beneficiary Status 38

TABLE OF CONTENTS—Continued

Page

2. Petitioners Have No Contractual Right to Reclamation Water Under The 1963 Contract 39

3. Petitioners Have No State or Federal Property Right to Reclamation Water ... 40

E. The *Barcellos I* Judgment is Irrelevant to Petitioners' Claims 49

CONCLUSION 50

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Airplane Sales Int'l Corp. v. United States, 54 Fed. Cl. 418 (Ct. Cl. 2002)	38
Ardestani v. INS, 502 U.S. 129 (1991)	22
Arizona v. Colorado, 373 U.S. 546 (1963)	45
Audio Odyssey, Ltd. v. United States, 255 F.3d 512 (8th Cir. 2001)	37
Audio Odyssey, Ltd. v. United States, 373 F.3d 870 (8th Cir. 2004)	38
Barcellos & Wolfsen, Inc. v. Westlands Water District, 849 F. Supp. 717 (E.D. Cal. 1993), *aff'd sub nom., O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995)	9, 45
Barcellos & Wolfsen, Inc. v. Westlands Water District, 491 F. Supp. 263 (E.D. Cal. 1980)	*passim*
Barcellos & Wolfsen, Inc. v. Westlands Water District, 899 F.2d 814 (9th Cir.), *cert. denied*, 498 U.S. 998 (1990)	7, 21
Block v. North Dakota, 461 U.S. 273 (1983)	18, 23
Bowen v. Public Agencies, 477 U.S. 41 (1986)	46
Bryant v. Yellen, 447 U.S. 352 (1980)	44, 45
Busby School of Northern Cheyenne Tribe v. United States, 8 Cl. Ct. 596 (1985)	29
California v. United States, 438 U.S. 645 (1978)	2, 41
Carlow v. United States, 40 Fed. Cl. 773 (Ct. Cl. 1998)	29
Castle v. United States, 301 F.3d 1328 (Fed. Cir. 2002), *cert. denied*, 539 U.S. 925 (2003)	39
Chancellor Manor v. United States, 331 F.3d 891 (Fed. Cir. 2003)	23, 29, 39
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	18
Dugan v. Rank, 372 U.S. 609 (1963)	14, 19, 20

TABLE OF AUTHORITIES—Continued

	Page
Federal Housing Admin. v. Darlington, Inc., 358 U.S. 84 (1958)	29
Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940)	42
German Alliance Insurance Co. v. Home Water Supply Co., 226 U.S. 220 (1912)	*passim*
Glass v. United States, 258 F.3d 1349 (Fed. Cir. 2001)	39
Guardsman Elevator Co. v. United States, 50 Fed. Cl. 577 (Ct. Cl. 2001)	37
Hebah v. United States, 428 F.2d 1334 (Ct. Cl. 1970)	29
Hendrick v. Lindsay, 93 U.S. 143 (1876)	24
Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981)	37
Ickes v. Fox, 300 U.S. 82 (1937)	46, 47
Idaho v. Oregon, 444 U.S. 380 (1980)	17
Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958)	3, 4, 6
Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 1999), *cert. denied*, 531 U.S. 812 (2000)	12
Lane v. Pena, 518 U.S. 187 (1996)	15, 16, 20, 22
Lehman v. Nakshian, 453 U.S. 156 (1981)	15
NRDC v. Houston, 146 F.3d 1118 (9th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999)	7
Nebraska v. Wyoming, 325 U.S. 589 (1945)	46, 47
Nevada v. United States, 463 U.S. 110 (1983)	46, 47
O'Neill v. United States, 50 F.3d 677 (9th Cir.), *cert. denied*, 516 U.S. 1028 (1995)	*passim*
Peterson v. Department of Interior, 899 F.2d 799 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990)	2, 4
Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947)	27

TABLE OF AUTHORITIES—Continued

	Page
Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968)	17
Schuerman v. United States, 30 Fed. Cl. 420 (Ct. Cl. 1994)	37
Stafford v. Briggs, 444 U.S. 527 (1980)	14
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998)	15
TRW Inc. v. Andrews, 534 U.S. 19 (2001)	23
Temple v. Synthes Corp., Ltd., 498 U.S. 5 (1991)	17
United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983)	48, 49
United States v. District Court, 401 U.S. 520 (1971)	19
United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950)	42
United States v. Mitchell, 445 U.S. 535 (1980)	15
United States v. Nordic Village, 503 U.S. 30 (1992)	20
United States v. Sherwood, 312 U.S. 584 (1941)	15, 18
United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940)	15
United States v. Williams, 514 U.S. 527 (1995)	15
United Steelworkers v. Rawson, 495 U.S. 362 (1990)	36
Westlands Water Dist. v. NRDC, 43 F.3d 457 (9th Cir. 1994)	7
Westlands Water Dist. v. Patterson, 864 F. Supp. 1536 (E.D. Cal. 1994)	19
Westlands Water Dist. v. United States, 337 F.3d 1092 (9th Cir. 2003)	4, 45

TABLE OF AUTHORITIES—Continued

STATE CASES	Page
County of San Joaquin v. State Water Resources Control Board, 54 Cal. App. 4th 1144 (1997), *cert. denied*, 522 U.S. 1048 (1998)	42
Environmental Defense Fund v. East Bay Municipal Utility District, 26 Cal.3d 183 (1980)	43
Gonzalez v. City of Mission, 620 S.W.2d 918 (Tex. App. 1981)	29
H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928)	25, 26
Ivanhoe Irrig. District v. All Parties and Persons, 47 Cal.2d 597 (1957)	44
Ivanhoe Irrig. District v. All Parties and Persons, 53 Cal.2d 692 (1960)	44
Joslin v. Marin Municipal Water District, 67 Cal.2d 132 (1967)	43, 44
Martinez v. Socoma Cos., 11 Cal.3d 394 (1974)	29
National Audubon Society v. Superior Court, 33 Cal.3d 419, *cert. denied*, 464 U.S. 977 (1983)	41, 43, 44
People v. Glen-Colusa Irrig. District, 127 Cal. App. 30 (1932)	43
State Water Resources Control Board Cases, Coord. Special Proc. No. JC 4118, Statement of Decision (Cal. Superior Ct. May 5, 2003)	42, 44
United States v. State Water Resources Control Board, 182 Cal. App. 3d 82 (1986)	8, 42, 43, 46
FEDERAL STATUTES	
5 U.S.C. §702	21
16 U.S.C. §§1531 *et seq.*	2
28 U.S.C. §1346	18, 20
28 U.S.C. §1491	13, 15, 18, 20, 23
42 U.S.C. §§4321 *et seq.*	10

TABLE OF AUTHORITIES—Continued

	Page
43 U.S.C. §372	3, 47, 48
43 U.S.C. §383	3, 41, 47
43 U.S.C. §390aa	4
43 U.S.C. §390cc-hh	4, 50
43 U.S.C. §390uu	*passim*
43 U.S.C. §423e	3, 31
43 U.S.C. §431	3
43 U.S.C. §485h(d)	6
43 U.S.C. §485h(e)	6, 47
43 U.S.C. §666	11, 14, 18
Reclamation Act of 1902, ch. 1093, 32 Stat. 388	2, 3
Act of May 15, 1922, ch. 190, §1, 42 Stat. 541	30
Omnibus Adjustment Act of 1926, ch. 383, §46, 44 Stat. 636, 649	3, 31, 35
Act of August 26, 1937, ch. 832, §2, 50 Stat. 844, 850	2, 4, 8, 28
Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187	6, 47
Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156	4
Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261	*passim*
Central Valley Project Improvement Act of 1992, Pub. L. No. 102-575, 106 Stat. 4706	*passim*
FEDERAL ADMINISTRATIVE MATERIALS	
43 C.F.R. §428.3	32
50 C.F.R. §17.11 (1993)	9
50 C.F.R. §227.4 (1993)	9
Legal Questions, Sol. Op. M-36901, 85 Interior Dec. 297 (1978)	6

TABLE OF AUTHORITIES—Continued

	Page
FEDERAL RULES OF CIVIL PROCEDURE	
Fed. R. Civ. P. 19	16, 17, 19
CONGRESSIONAL MATERIALS	
35 Cong. Rec. 6677 (1902)	49
35 Cong. Rec. 2222 (1902)	49
62 Cong. Rec. 3574 (1922)	30
62 Cong. Rec. 3575 (1922)	30
62 Cong. Rec. 3578 (1922)	30
62 Cong. Rec. 3580 (1922)	30
62 Cong. Rec. 5859 (1922)	31
H. R. Rep. No. 57-794 (1902)	48
H. R. Rep. No. 57-1468 (1902)	48
H. R. Rep. No. 67-662 (1922)	30
S. Doc. 68-92 (1924)	31
S. Rep. No. 82-755 (1951)	18, 19
STATE CONSTITUTION AND STATUTES	
Cal. Const. art. X, §2	43, 45
Cal. Water Code §100	43
Cal. Water Code §1225	41
Cal. Water Code §1243	44
Cal. Water Code §§20500 *et seq.*	30
Cal. Water Code §23200	45
STATE ADMINISTRATIVE MATERIALS	
California State Water Resources Control Board Revised Decision 1641, 1999 WL. 1678482 (Mar. 15, 2000)	41, 42, 44, 45
MISCELLANEOUS	
Arthur L. Corbin, *Corbin on Contracts* §775 (1952)	26
Brian E. Gray, *The Property Right in Water*, 9 Hastings W.-N.W. J. Envtl. L. & Policy 1 (2002)	43, 45

TABLE OF AUTHORITIES—Continued

	Page
Melvin A. Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358 (1992)	24, 26
Dean E. Murphy, *Water Contract Renewals Stir Debate Between Environmentalists and Farmers in California*, N.Y. Times, Dec. 15, 2004	4
Restatement (Second) of Contracts §302 (1979)	49
Restatement (Second) of Contracts §309 (1979)	36
Restatement (Second) of Contracts §313 (1979)	26, 27
Joseph Sax, *Federal Reclamation Law* in 2 Water & Water Rights (R. Clark ed. 1967)	3, 28, 48
Joseph Sax, *Problems of Federalism in Reclamation Law*, 37 U. Colo. L. Rev. 49 1964)	3
Paul S. Taylor, *Excess Land Law: Calculated Circumvention*, 52 Cal. L. Rev. 978 (1964)	3, 4
Paul S. Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale L.J. 477 (1955)	3, 48
7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1602 (3d ed. 2001)	16
http://www.westlandswater.org/aboutwwd/regs0.htm (last visited Jan. 4, 2005)	26
http://www.westlandswater.org/aboutwwd/distdesc1.htm (last visited Jan. 4, 2005)	28
http://www.usbr.gov/dataweb/html/mpcvpprjdata.html (last visited Jan. 4, 2005)	31
http://www.westlandswater.org/wwd/aboutwwd/aboutwwd.asp (last visited Jan. 4, 2005)	32
http://www.saccourt.com/CoordCases/swrcb/orders/SWRCB CaseDecision5-5-03.PDF (last visited Jan. 4, 2005)	42

IN THE

Supreme Court of the United States

No. 03-1566

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents,

WESTLANDS WATER DISTRICT,
Plaintiff Intervenor-Respondent,

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Defendant Intervenors-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR INTERVENORS–RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, *et al.*

STATEMENT OF THE CASE

1. This case presents the latest effort by recipients of federally-subsidized reclamation water in California to challenge the United States Bureau of Reclamation's ("Bureau's") compliance with its statutory and contractual obligations in administering the Central Valley Project ("CVP"). Petitioners own or operate agricultural lands within the West-

lands Water District ("District"). In 1963, the Bureau and the District entered into a 40-year contract for the delivery of CVP water to the District, which in turn delivers water to petitioners and other end-users. In the early 1990s, the Bureau reduced the amount of water delivered, to comply with the Endangered Species Act ("ESA"), 16 U.S.C. §§1531 *et seq.*, and the Central Valley Project Improvement Act ("CVPIA"), Pub. L. No. 102-575, 106 Stat. 4706. Petitioners challenged that reduction in previous litigation, which was resolved by the Ninth Circuit's holding that Art. 11(a) of the 1963 contract "absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." *O'Neill v. United States*, 50 F.3d 677, 689 (9th Cir.), *cert. denied*, 516 U.S. 1028 (1995). Petitioners nonetheless reassert their contract construction claims in this case, alleging standing as third-party beneficiaries under the 1963 contract to hold the United States liable for more than $32 million in consequential damages, including lost crop profits.

2. *The statutory framework.* The 1963 contract between the District and the Bureau was executed pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, as amended. *See* 1963 Contract Preamble at Joint Appendix ("JA") 30. "In that Act, Congress set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States." *California v. United States*, 438 U.S. 645, 650 (1978). The purposes of the federal reclamation program are diverse, and include promoting navigation, protecting fisheries and water quality, preventing land monopoly and speculation in the West, and ensuring "the orderly development of the West" through development of an agrarian society of family-owned farms.[1]

[1] *See* Act of August 26, 1937, ch. 832, §2, 50 Stat. 844, 850; CVPIA, Pub. L. No. 102-575, §3406(a), 106 Stat. 4706, 4714; *Peterson v. Dep't of Interior*, 899 F.2d 799, 802-04 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990); Joseph Sax, *Federal Reclamation Law*, §120.1 at 210 *in* 2 Water & Water Rights 210 (R. Clark ed. 1967) ("*Federal Reclamation Law*"); Paul S. Taylor, *Excess Land Law: Calculated Circumvention*, 52 Cal. L. Rev. 978, 979 (1964) ("*Calculated Circumvention*"); Paul S. Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale L.J. 477, 477 (1955) ("*Public Policy*").

The 1902 Reclamation Act includes several provisions that promote these goals. The "proviso" to Section 8 of the 1902 Act specifies that water rights are to be "appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of that right." Reclamation Act of 1902, ch. 1093, §8, 32 Stat. 388, 390, 43 U.S.C. §372, 383. This provision ties "the water to the land" to "prevent[] speculation in water rights" by those receiving subsidized reclamation water. Sax, *Federal Reclamation Law*, at 210; *see also* Taylor, *Public Policy*, 64 Yale L.J. at 486 ("tying water and land together in common ownership [was] among the surest of anti-monopoly devices"). The "excess land" provision, which provided that "[n]o right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner," Reclamation Act 1902, ch. 1093, §5, 32 Stat. 388, 389, 43 U.S.C. §431, "limit[ed] the quantity of land in a single ownership to which project water might be supplied" to ensure that "the benefits [of the reclamation program will] be made available to the largest number of people, consistent, of course, with the public good." *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 292 (1958); *see* Taylor, *Public Policy*, 64 Yale L.J. at 486; Joseph Sax, *Problems of Federalism in Reclamation Law*, 37 U. Colo. L. Rev. 49, 67 (1964). Congress subsequently required reclamation water users who owned land in excess of 160 acres to execute "recordable contracts" with the Secretary of the Interior to sell their excess lands within 10 years. Omnibus Adjustment Act of 1926, ch. 383, §46, 44 Stat. 636, 649, 43 U.S.C. §423e. And in 1982, Congress enacted the Reclamation

Reform Act which, among other things, increased the acreage limitation but required that water for excess lands be sold at "full cost." Pub. L. No. 97-293, §§201, 203-08, 96 Stat. 1261, 1263-67, 43 U.S.C. §§390aa, 390cc-390hh.[2]

3. *The 1963 Contract.* In 1937, Congress authorized the construction of the Central Valley Project ("CVP"), the nation's largest reclamation project, which redistributes fresh water resources throughout California's 400 mile-long Central Valley for the purposes of

> improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof . . . for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy.

Act of August 26, 1937, ch. 832, §2, 50 Stat. 844, 850; *see Westlands Water Dist. v. United States*, 337 F.3d 1092, 1095 (9th Cir. 2003). Subsequent legislation authorized construction of the San Luis Unit of the CVP, Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156, which became the source of reclamation water for the District and other water agencies. JA 30.

In 1963, the United States and the District entered into a long-term contract for the delivery of a "supplemental water

[2] The highly-subsidized price of reclamation water reflects "but a small fraction of the total cost of the project." *Ivanhoe*, 357 U.S. at 283; Taylor, *Calculated Circumvention*, 52 Cal. L. Rev. at 979. In the late 1980s, the government calculated that "the average [then-] present value of the irrigation subsidy for recipients of water from the Central Valley Project" was $1,850 per acre. *Peterson*, 899 F.2d at 805-06. A recent study by the Environmental Working Group calculated, based on estimated replacement costs of water, that recipients of CVP water obtain a subsidy of $416 million per year. Dean E. Murphy, *Water Contract Renewals Stir Debate Between Environmentalists and Farmers in California*, N.Y. Times, Dec. 15, 2004, at A15.

supply" to the District for such purposes as "irrigation, municipal, domestic, and other beneficial uses." Preamble at JA 30-31. The Bureau agreed to furnish that supplemental water from the San Luis Unit, when available, pursuant to an annual schedule for delivery and subject to a contractual maximum amount; and the District agreed to accept and pay for the delivered water at $7.50 per acre-foot plus $0.50 for drainage service. Arts. 3, 6 at JA 34-36, 38-39. The 1963 contract, which was for 40 years from the "initial delivery date," expires in 2007. Art. 2 at JA 33; JA 109.

Recognizing the variability of river flows and the competing demands on water resources, federal reclamation contracts limit the liability of the United States in the event of reduced water deliveries. The 1963 contract limits the United States' liability in several respects. Article 11 provides that upon "a shortage [of water] from any cause, the United States [may] apportion the available water supply among the District and others entitled under the then existing contracts to receive water from the San Luis Unit." Art. 11 at JA 42. The amount and manner of such apportionments are subject to the "conclusive determinations of the Contracting Officer" (defined as "the Secretary of the United States Department of the Interior or his duly authorized representative"). Arts. 11(a), 1(a) at JA 32, 43. The "sole remedy" for any dispute over apportionment is an "adjustment" of the payments made by the District. Arts. 7, 11(b) at JA 39, 43. Article 11(a) also explicitly limits liability, stating that "in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes." Art. 11(a) at JA 42. Further, Article 9(c) states: "The United States shall not be responsible for . . . claim of damage of any nature whatsoever . . . arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such water beyond such delivery points," Art. 9(c) at JA 40-41, thus insulating the United

States from damages claims arising after the Bureau provides contract water to the District at the designated delivery points. In addition, the contract reserves the United States' right to amend the reclamation laws, *see* Art. 26 at JA 53, making clear that the 1963 contract, which "was executed pursuant to the 1902 Reclamation Act and all acts amendatory or supplementary thereto," "'remain[s] subject to subsequent legislation' [enacted by the United States as] sovereign." *O'Neill*, 50 F.3d at 686 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982)).

4. *Prior litigation over the 1963 Contract.* Federal law prohibits the Bureau from delivering any reclamation water until it has executed a contract for payment from the receiving water district. 43 U.S.C. §485h(d), (e). The Bureau may enter into either a "repayment contract" under §9(d) of the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187, requiring the district to repay its share of project costs exclusive of interest, 43 U.S.C. §485h(d); *Ivanhoe*, 357 U.S. at 286, or a "water service" contract under the "more liberal provisions of §9(e) of [the] Act," *id.*, charging the district rates that, in the judgment of the Secretary of Interior, will "cover an appropriate share" of project costs, exclusive of interest. 43 U.S.C. §485h(e). The 1963 contract is a "water service" contract. Westlands Water District—Legal Questions, Sol. Op. M-36901, 85 Interior Dec. 297, 317 (1978).

In 1979, landowners within the original geographic boundaries of the District ("Area I") filed a California state court action against the District, contending that they were entitled to higher water priorities than the landowners that joined the District pursuant to a 1965 merger. *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 491 F. Supp. 263, 265 (E.D. Cal. 1980) ("*Barcellos I*"). The Area I landowners also sued those allegedly "junior" water users, but did not sue the Bureau, which the District joined as an indispensable party after removing the case to federal court. *Id.*

The *Barcellos I* litigation was resolved by stipulated judgment in 1986. JA 101-47. The judgment characterized the 1963 Contract as "a valid, enforceable and implementable contract entitling the District through the end of 2007 to water and other service . . . as specified therein." JA 111. The stipulated judgment also contained an enforcement clause, allowing the parties to "obtain relief from a violation of this Judgment" by filing a motion or a new action "for the sole purpose of seeking an order directing the Federal parties to perform in accordance with the express terms of this Judgment." JA 109-10.

In 1982 and 1987, Congress amended the reclamation laws to limit the availability of federally-subsidized reclamation water to large-scale operations and landowners, requiring among other things that certain lands held in excess of the acreage limitation be charged the full-cost rate for water, rather than the subsidized price. *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 817-19 (9th Cir.), *cert. denied*, 498 U.S. 998 (1990) ("*Barcellos II*"). Area I landowners challenged that legislation through a motion to enforce the *Barcellos I* stipulated judgment, asserting a right to pay only $8 per acre-foot for water on their excess lands (including lands not disposed of within the period required by their recordable contracts) rather than the full-cost rate ($42 per acre-foot). *Id.* at 819-21. The Ninth Circuit affirmed the district court's denial of the landowners' motion for specific performance (they sought no damages), concluding that the landowners did not possess the contract rights they claimed. *Id.* at 825.

By the early 1990s, more than a half century of massive federal and state water diversions had placed the Central Valley's natural environment under considerable stress. *See, e.g., NRDC v. Houston*, 146 F.3d 1118, 1124 (9th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999); *Westlands Water Dist. v. NRDC*, 43 F.3d 457, 459 (9th Cir. 1994). In 1992, Congress

passed and President Bush signed into law the CVPIA, which amended the reclamation laws by requiring the Secretary of Interior to comply with the ESA in operating the CVP and to take other measures to protect fish, wildlife, and habitat. CVPIA, Pub. L. No. 102-575, §§3406(b), 3408(g), 106 Stat. 4706, 4714, 4729. Among the CVPIA's purposes were to "protect, restore, and enhance fish, wildlife, and associated habitat in the Central Valley," to "address impacts of the Central Valley Project on fish, wildlife, and associated habitats," and to restore "balance" among agricultural, urban, and environmental water demands on the CVP. *Id.* at §3402, 106 Stat. 4706. The CVPIA amended the CVP's initial authorizing statute (which had required the dams and reservoirs on the San Joaquin River to "be used, first, for river regulation, improvement of navigation, and flood control," Act of August 26, 1937, ch. 832, §2, 50 Stat. 844, 850; *see also United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 135 (1986)), to include protection and restoration of fish and wildlife as a major purpose of the Project. *See* CVPIA, Pub. L. No. 102-575, §3406(a), 106 Stat. 4706, 4714.

Congress in the CVPIA instructed the Secretary "immediately upon enactment of this title, [to] operate the Central Valley Project to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act," to "dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title," and to furnish "firm water supplies of suitable quality to maintain and improve wetland habitat" in designated areas within the California Central Valley, including in the National Wildlife Refuge System. CVPIA, Pub. L. No. 102-575, §3406(b), 106 Stat. 4717; *id.* at §3406(b)(2), 106 Stat. 4715; *id.* at §3406(d), 106 Stat. 4722. The CVPIA also established a Restoration Fund, funded by a general surcharge on

all CVP water, to restore, improve and acquire habitat. *Id.* at §3407, 106 Stat. 4726.

In 1990, the National Marine Fisheries Service ("NMFS") listed the Sacramento River winter-run Chinook salmon as a threatened species under the ESA. *See* 50 C.F.R. §227.4 (1993). In 1993, the United States Fish and Wildlife Service ("USFWS") listed the delta smelt as a threatened species. *See* 50 C.F.R. §17.11 (1993). The NMFS and the USFWS subsequently concluded that the Bureau's manner of operating the CVP, and in particular, its use of pumps to withdraw water from the fragile Sacramento-San Joaquin Delta for transport to certain contracting districts, jeopardized the continued existence of those threatened species, but that the jeopardy could be reduced by altering CVP operations. *See O'Neill*, 50 F.3d at 681.

Pursuant to the CVPIA and in response to the ESA listing of winter-run chinook salmon and delta smelt, the Bureau in 1993 imposed operating restrictions on the pumps delivering water south of the Sacramento-San Joaquin Delta, effectively reducing the amount of water available for delivery to the District.[3] Petitioners initially challenged those water reductions through a motion to enforce the 1986 *Barcellos I* stipulated judgment. *See O'Neill*, 50 F.3d at 681. The district court and Ninth Circuit rejected those challenges, concluding that Art. 11(a) of the 1963 contract, which provides that the government shall not be liable "for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or *any other causes,*" JA 42 (emphasis

---

[3] *See Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 720-21 (E.D. Cal. 1993), *aff'd sub nom.*, *O'Neill*, 50 F.3d 677; Dist. Ct. Docket No. 73 (Nov. 8, 1993), Request for Judicial Notice by Intervenors Friant Water Users Authority *et al.* ("*RJN*") Ex. 4(a) at 614 (Bureau of Reclamation, *Central Valley Project Water Supply for 1993* (Feb. 15, 1993)); *id.*, *RJN* Ex. 4(c) at 624 (Bureau of Reclamation, *Central Valley Project Water Supply for 1993* (April 7, 1993)).

added), "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate," such as the ESA and CVPIA. *O'Neill*, 50 F.3d at 689; *id.* at 683 ("'any other causes' broadly and unambiguously contemplates the effects of subsequent Congressional mandates").

5. *The proceedings below.* At the same time the Area I landowners were challenging the Bureau's water reduction in *O'Neill*, the District was separately challenging that reduction in the present litigation. Initially, the District asserted mainly statutory claims under the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.*, and the ESA. Ninth Cir. Docket (June 25, 2001), Westlands Excerpts of Record ("WER") at 11-15; *see also O'Neill*, 50 F.3d at 688. Various groups intervened, including petitioners in this case, as plaintiffs, and respondents Natural Resources Defense Council and several fishing and other conservation organizations (collectively "NRDC"), as defendants. Pet. App. 4a, 25a.

In December 1994, the United States, the State of California, the District, and a broad array of other entities affected by the diversion of reclamation water from the San Francisco Bay and Sacramento Delta region negotiated the comprehensive "Principles for Agreement on Bay-Delta Standards Between the State of California and Federal Government" ("Delta Accord"). Dist. Ct. Docket No. 435 (May 5, 1995), Status Conf. Statement at 3. In light of the Delta Accord, all parties except petitioners stipulated to the dismissal of the District's complaint.[4]

Petitioners' complaint, amended after the district court's dismissal, alleged, *inter alia*, that the Bureau's reduction in water allocations to the District in 1993-94 and 1994-95 and

[4] *Id.*; Dist. Ct. Docket No. 439 (May 23, 1995), Stip. and Order.; Dist. Ct. Docket No. 438 (May 23, 1995), Order After Scheduling Conf.; *see also* Dist. Ct. Docket Nos. 442, 440, 452, 464.

its imposition of taxes and assessments to pay increased charges under CVPIA §3407 for the Restoration Fund violated the quantity and price terms of the 1963 contract. WER 31-84. Petitioners sought consequential contract damages exceeding $32 million and alleged that the United States had waived sovereign immunity in the Reclamation Reform Act, 43 U.S.C. §390uu, and the McCarran Amendment, 43 U.S.C. §666. WER 34, 71, 80.

All of petitioners' claims except for breach of the 1963 contract were subsequently either abandoned as moot, dismissed for lack of subject matter jurisdiction, or rejected on summary judgment. Pet. App. 4a-5a, 21a-22a. When the district court indicated that its pending judgment would bind the District as well as petitioners, the District moved to intervene, emphasizing the parties' differing views of the 1963 contract:

> The potential for practical impairment of Westlands' interests if intervention is not granted is self-evident. Moreover, Westlands' position with respect to the 1963 Contract, the 1965 Contract and the *Barcellos* Judgment is different from—and broader than—that of the Area I Intervenors. As this Court is aware, the differences between Westlands and the Area I intervenors have erupted into disputes and litigation in the past. In short, the Area I Intervenors do *not* represent the interests of Westlands, much less "adequately" represent Westlands' interests for purposes of intervention analysis.

Dist. Ct. Docket No. 596 (Aug. 13, 1998), Mem. of Ps & As in Support of Intervention, at 1. The district court subsequently deleted its reference to binding the District, noting that petitioners "disagree with Westlands on some issues in this litigation" and "that Area I and Westlands have differing interests." WER 305.

The Bureau moved for reconsideration of the district court's merits ruling on the ground that the United States had

not waived sovereign immunity to be sued for damages by non-parties to the 1963 contract. The district court agreed in light of *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), *cert. denied*, 531 U.S. 812 (2000), and ruled that petitioners were not intended beneficiaries of the 1963 contract because that contract evidenced no "intent to create in water users direct enforcement rights against the United States." Pet. App. 33a.

The district court rejected petitioners' argument that their independently-executed recordable contracts entitled them to enforce the 1963 contract. *Id.* at 34a-37a. The court also rejected petitioners' reliance upon *Barcellos I*, holding that it did not authorize a claim for money damages and that §390uu did not waive the government's immunity from suit under the stipulated judgment. *Id.* at 39a, 42a, 45a. Although the district court on three occasions invited petitioners to transfer their jurisdictionally-barred damages claims to the Court of Claims, petitioners declined each offer. *Id.* at 22a, 46a. The court then granted judgment to the government and respondent organizations. *Id.* at 22a.

On petitioners' appeal,[5] the Ninth Circuit affirmed on the ground that the government had not waived its sovereign immunity. *Id.* at 2a. As a threshold matter, the court rejected petitioners' argument that the government was claim- or issue-precluded from asserting a sovereign immunity defense. *Id.* at 6a-7a. The court also rejected petitioners' reliance on the McCarran Amendment, which waives sovereign immunity for general adjudications of the rights of *all* claimants on a stream. *Id.* at 7a. Finally, the court agreed that §390uu did not authorize district court jurisdiction because petitioners were not "contracting entities" entitled to sue the United

[5] The District intervened to support the government's argument that the court lacked jurisdiction because sovereign immunity had not been waived. *See* Ninth Cir. Docket (June 25, 2001), Westlands Opening Br. at 2.

States. *Id.* at 9a, 17a. Given the jurisdictional basis of its holdings, the Ninth Circuit vacated the district court's merits rulings against petitioners. *Id.* at 18a.

SUMMARY OF ARGUMENT

Although the underlying policy disputes among CVP water users and providers are weighty, the issues before this Court raise narrow questions of sovereign immunity and third-party standing. Two independent grounds support the judgment below.

First, the United States has not waived sovereign immunity under the Reclamation Reform Act of 1982, 43 U.S.C. §390uu. That statute does not allow district court actions for money damages against the United States, but only permits parties to reclamation contracts to "join the United States as a necessary party defendant" in a district court action when necessary "to adjudicate, confirm, validate, or decree" a dispute over reclamation contract rights. The plain language of §390uu demonstrates Congress' intent to subject the sovereign to suit in district court only where other litigants seek to adjudicate conflicting claims of contract rights and the United States' presence is necessary for a complete adjudication of those rights. Unlike the Tucker Act, 28 U.S.C. §1491, which permits contract damages against the United States in the Court of Federal Claims, the Reclamation Reform Act does not allow damages actions against the United States for breach of a reclamation contract.

Second, the contracting parties' intent as established by the contract language and statutory context forecloses petitioners' effort to sue as third-party beneficiaries for consequential contract damages. Congress in the 1920s amended the reclamation laws to transform the reclamation program from a regime of direct contractual relationships with individual water users to one in which the Bureau could only contract with state-authorized districts. The 1963 contract implements Congress' intent to minimize the risk to the federal treasury and

to promote administrative efficiency by ensuring that the rights and obligations under the contract belong exclusively to the United States and the District and by expressly limiting the United States' damages liability.

ARGUMENT

I. THE UNITED STATES HAS NOT CONSENTED TO BE SUED IN DISTRICT COURT BY INDIVIDUAL WATER USERS SEEKING DAMAGES FOR ALLEGED BREACHES OF THE BUREAU'S RECLAMATION CONTRACTS

The courts below were correct that the United States' waiver of sovereign immunity in 43 U.S.C. §390uu does not authorize federal district court jurisdiction in this suit for consequential contract damages. Although those courts focused their sovereign immunity inquiry on whether petitioners were intended beneficiaries of the 1963 contract, there are several threshold reasons why §390uu cannot be construed to waive sovereign immunity in this action.[6]

Section 390uu provides, *inter alia*:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. . . .

Surprisingly, petitioners and their *amici* never discuss this statutory language. Nor do they explicitly address sovereign immunity at all, which, as a jurisdictional issue, cannot be waived, *see United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940), and must precede any consideration of the merits, *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-94 (1998).

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). "In the absence of clear congressional consent, . . . 'there is no jurisdiction. . . to entertain suits against the United States.'" *Mitchell*, 445 U.S. at 538 (quoting *Sherwood*, 312 U.S. at 587-88)). A waiver of "sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Any waiver of immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." *Id.* Thus, this Court will "construe ambiguities in favor of immunity," *United States v. Williams*, 514 U.S 527, 531 (1995), and any "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied," *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981).

A. The United States Has Not Been Joined As A Necessary Party Defendant

"The terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." *Sherwood*, 312 U.S. at 586. Although Congress in the Tucker Act, 28 U.S.C. §1491, consented to allow suits in the Court of Federal Claims for contract damages, Congress in §390uu only consented to federal district court jurisdiction in that

---

[6] The only other supposed statutory waiver invoked by petitioners below was the McCarran Amendment, 43 U.S.C. §666, but petitioners do not contest the Ninth Circuit's ruling that this private damages action is not the type of general stream adjudication contemplated by that statute. Pet. App. 7a; *see Dugan v. Rank*, 372 U.S. 609, 618 (1963).

Although petitioners named defendants other than the "United States" in their amended complaint, those defendants are all federal agencies or federal officials (and while respondent NRDC intervened as a defendant below, petitioners asserted no contract claim against it). WER 31, 37-38. Because petitioners seek damages only from the federal treasury, their lawsuit is only against the United States for sovereign immunity purposes. *See Dugan*, 372 U.S. at 621; *Stafford v. Briggs*, 444 U.S. 527, 542 n.10 (1980).

narrow class of cases where litigants seek to adjudicate competing claims of right under a reclamation contract and "joinder" of the United States as an additional party defendant is "necessary" for a full and fair adjudication of rights under that contract. The present suit, to which the United States has *not* been "join[ed] . . . as a necessary party defendant" but instead involves a breach of contract claim directly against the United States, is not the type of suit involving competing claims of right by parties other than the United States to which Congress consented in enacting §390uu.

Because a waiver of "sovereign immunity must be unequivocally expressed in statutory text," *Lane*, 518 U.S. at 192, the sovereign immunity inquiry must begin and end with the plain statutory language. *Id.* ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text."). Section 390uu by its terms applies only to cases in which the United States has been "join[ed] . . . as a necessary party defendant." This phrase invokes Federal Rule of Civil Procedure 19, the purpose of which is to facilitate, through the joinder of necessary parties, a full and complete adjudication of claims. Fed. R. Civ. P. 19 Advisory Comm. Notes (1966 amendment) ("complete disposition"); 7 Wright, Miller & Kane, Federal Practice and Procedure: Civil §1602 at 20 (3d ed. 2001) ("full adjudication"). Rule 19(a) permits the "joinder" of a party if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other-wise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). Rule 19(b) requires dismissal of an action if a party that satisfies the requirements of Rule 19(a)

is "indispensable" to that action but cannot be joined. Fed. R. Civ. P. 19(b). Although the 1966 amendment to Rule 19 eliminated the previously-used term "necessary," courts continue to use the term, either as a synonym for "indispensable," *see, e.g., Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 6 (1991); *Idaho v. Oregon*, 444 U.S. 380, 386 (1980), or to refer to the broader group of parties whose joinder under Rule 19(a) is desirable but not required, *see Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n.12 (1968). Under either approach, a "necessary party" is one who satisfies the "threshold" requirements of Rule 19(a). *See Temple*, 498 U.S. at 8 (party is not indispensable under Rule 19(b) unless it satisfies "threshold" requirements of Rule 19(a)).

By including the specific "join . . . as a necessary party defendant" language in §390uu, Congress limited the statutory waiver to district court cases in which the parties, whose dispute requires judicial construction of a reclamation contract, cannot obtain complete relief without joining the United States, *cf.* Fed. R. Civ. P. 19(a)(1), or where the absence of the United States would impair or impede the government's interest in its contract or subject the other litigants to potentially inconsistent judgments, *cf.* Fed. R. Civ. P. 19(a)(2). Under these scenarios, parties other than the United States (*e.g.*, two water districts, or a water district and water user) seeking judicial construction of a reclamation contract may join the United States as a defendant in their district court action as necessary to obtain complete adjudication of their competing claims.

That Congress did not intend §390uu to authorize contract damages actions directly against the United States is confirmed by comparing other statutory waiver language in which Congress consented more broadly to contract actions against the United States. The Tucker Act, for instance, grants the Court of Federal Claims jurisdiction "upon any

claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. §1491 (a)(2). The "little" Tucker Act, waiving immunity in district court actions for contract claims under $10,000, applies to "[a]ny . . . civil action or claim against the United States . . . upon any express or implied contract with the United States." 28 U.S.C. §1346(a)(1). These statutes do not contain the additional limiting language requiring that the United States be "join[ed] . . . as a necessary party defendant." "[W]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *see also Sherwood*, 312 U.S. at 588-92 (because Tucker Act waiver is "conditioned . . . on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government," immunity not waived in contract dispute against United States that required joinder of additional private defendant).

The phrase "join[ed] . . . as a necessary party defendant" in §390uu finds striking parallel in the language of the McCarran Amendment, 43 U.S.C. §666 ("Consent is given to join the United States as a defendant in any suit, [*inter alia*] . . . . for the administration of [water] rights . . . [where] the United States is a necessary party to such suit "). The purpose of the McCarran Amendment was to ensure that the immunity of the United States would not interfere with the states' "administration of and adjudication of water rights," in which "all water users on a stream, in practically every case are interested and necessary parties to any court proceedings" due to the "interlocking" nature of "adjudicated rights on any stream system." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810-11 (1976) (quoting S. Rep. No. 82-755, 4-5 (1951)). While the purpose of the McCarran Amendment is to facilitate the adjudication of water rights, it

"'is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.'" *United States v. District Court*, 401 U.S. 520, 525 (1971) (quoting S. Rep. No. 82-755 at 9). In *Dugan*, this Court held that the McCarran Amendment did not confer jurisdiction over a "private suit to determine water rights solely between [various water right claimants] and the United States," distinguishing the "private suit" before it and the "general" adjudications of water rights contemplated by the McCarran Amendment, in which "all of the claimants to water rights along the river are . . . made parties" and "relief is either asked or granted as between claimants." 372 U.S. at 618.

Like the McCarran Amendment, §390uu serves a narrow but important function—to permit a complete adjudication of rights under reclamation contracts with all necessary parties present, including the United States. A single reclamation project frequently delivers water under contracts to multiple water districts, which often assert competing priorities on project water. *See, e.g., Westlands Water Dist. v. Patterson*, 864 F.Supp. 1536, 1537-38, 1541-42 (E.D. Cal. 1994). Section 390uu ensures that the federal government's general immunity from suit will not prevent water districts from clarifying their potentially competing rights under, or relating to, a reclamation contract, as against the United States and other districts.

The only parties to this litigation asserting contract rights are petitioners; and the only party against which petitioners assert contract rights is the United States. Given the circumstances identified in Rule 19 for joinder of a necessary defendant, the absence of any joinder language in statutes that waive immunity in direct contract actions, and this Court's construction of the parallel language of the McCarran Amendment, §390uu should not be construed to waive sovereign

immunity in petitioners' "private suit . . . solely" against the United States. *Cf. Dugan,* 372 U.S. at 618.

B. Congress Has Not Unequivocally Authorized A Damages Remedy

This case falls outside the class of cases encompassed by §390uu for the independent but related reason that petitioners seek damages from the federal treasury. Congress did not unequivocally consent to a damages remedy in waiving immunity from suits where joinder of the United States is necessary for a complete adjudication of the rights of other litigants.

"To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192; *see also United States v. Nordic Village*, 503 U.S. 30, 34 (1992) (although §106(c) of the Bankruptcy Code "waives sovereign immunity, it fails to establish unambiguously that the waiver extends to monetary claims."). In *Lane*, the government's waiver of immunity under the Rehabilitation Act was held not to permit a claim for damages because the waiver did not "extend unambiguously to such monetary claims." 518 U.S. at 192. This Court contrasted the Rehabilitation Act's waiver language with other statutes in which Congress had demonstrated its "ability to craft a clear waiver of the Federal Government's sovereign immunity against particular remedies." 518 U.S. at 194. In *Nordic Village*, the Court similarly held that a provision of the Bankruptcy Code waiving the government's immunity did not include claims for monetary relief where the provision was susceptible of a "plausible" interpretation that barred monetary recovery. 503 U.S. at 35, 37.

Section 390uu's waiver language does not unambiguously allow claims for money damages. *Compare, e.g.,* 28 U.S.C. §1346, §1491 (waiving immunity in certain contract claims "for liquidated or unliquidated damages"); *see Nordic Village*, 503 U.S. at 37 ("the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text."). Instead, Congress specifically limited §390uu to specified "suit[s] to *adjudicate, confirm, validate, or decree* the contractual rights of a contracting entity and the United States" (emphasis added), thus using language encompassing only declaratory and perhaps injunctive relief. *Cf.* Art. 32 at JA 56-57 (standard reclamation contract language requiring judicial "validation" proceedings before the 1963 contract became binding). The limited scope of this waiver is fully consistent with the underlying purpose of §390uu—to enable litigants with competing reclamation contract claims to obtain a judicial clarification of their rights in a single district court proceeding. Full and fair adjudications of those claims can, of course, be achieved without any award of monetary damages where, for instance, different water districts wish to clarify their potentially competing priorities to water from the same reclamation project.[7]

[7] Even if §390uu could be construed to permit some damages liability, it would at most permit damages owed to a water district itself, as the "contracting entity." *See* 43 U.S.C. §390uu ("suit to adjudicate confirm, validate, or decree the contractual rights of a *contracting entity*"). Nothing in §390uu expresses the United States' consent to be sued by a non-contracting party for third-party damages that a contracting district could not have sought on its own behalf. *See* Pet. 24-25 & n.31.

Of course, petitioners were not without a mechanism for pursuing their claims against the Bureau. If petitioners were correct in their third-party beneficiary analysis, they could have brought this contract damages case in the Court of Claims. Pet. App. 22a. Petitioners could also have challenged the Bureau's allegedly unlawful agency action under the Administrative Procedure Act, which waives the government's immunity in suits for declaratory or injunctive relief where plaintiffs have "suffer[ed] legal wrong because of agency action" or are "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. §702. Petitioners also had the option of pursuing an action to enforce the *Barcellos I* judgment, which they earlier did in urging their current contract construction, *see O'Neill*, 50 F.3d at 681-82, and in asserting other related claims, *see Barcellos II*, 899 F.2d at 819-20.

C. Petitioners Cannot Overcome The Bar Of Sovereign Immunity By Asserting Third-Party Beneficiary Status

Although petitioners do not address sovereign immunity directly, the implication of their argument is that §390uu waives sovereign immunity, despite the express conditions on the waiver discussed above, in any case brought by an intended third-party beneficiary of a reclamation contract. This argument must also fail.

On its face, §390uu allows suits only over the rights of "contracting entit[ies]." It says nothing about "third-party beneficiaries." While the term "contracting entity" might plausibly be construed to include successors and assigns, *cf.* Art. 31(a) at JA 55, no reasonable construction encompasses non-party beneficiaries, whether intended or incidental. A waiver of immunity, this Court has instructed, "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane*, 518 U.S. at 192; *see also Ardestani v. INS*, 502 U.S. 129, 137 (1991). As third parties to the 1963 contract, petitioners are not "contracting entities." Indeed, petitioners have made clear that they seek to enforce their own rights to consequential damages, separate and distinct from any damages the District as "contracting entity" could have claimed. *See, e.g.*, Pet. Br. 45 & n.54; Pet. 24-25 & n.31; Ninth Cir. Docket (June 25, 2001), Orff Appellants Opening Br. at 2 ("The farmers sue to recover the damages *they have suffered* as a consequence of the government's violation of *their* water rights.") (emphasis added). Strict construction in favor of the sovereign, *see Lane*, 518 U.S. at 192, militates against allowing a third party to enforce contract rights unavailable to the "contracting entity" itself.[8]

[8] Where Congress intends to subject the government to suit for contractual breaches by non-contracting entities, it does not use limiting language such as "contracting entity." The Tucker Act, for example, which has been interpreted to permit suits by intended third-party beneficiaries, *see, e.g., Chancellor Manor v. United States*, 331 F.3d 891, 900-01 (Fed. Cir. 2003), waives immunity for "any claim against the United States founded [upon the Constitution, statutes, or regulations], or upon any express or implied contract with the United States." 28 U.S.C. §1491. While §390uu waives immunity in "any suit . . . regarding any [reclamation] contract," it also includes the additional limiting phrase "to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity," which has no counterpart in the Tucker Act. To construe §390uu as permitting third parties to enforce their own supposed contract rights would strip this additional contract language of independent meaning and thereby override a condition Congress has attached to the waiver of immunity. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting.") (internal quotation marks, citations omitted); *Block*, 461 U.S. at 287 ("conditions [on a waiver of immunity] must be strictly observed").

Second, even if the term "contracting entity" could be construed to encompass intended beneficiaries, petitioners are not intended beneficiaries for purposes of their current suit for contract damages. For the reasons stated below, permitting such claims under the 1963 contract would be inconsistent both with federal reclamation policy and with the express terms of that contract.

II. PETITIONERS MAY NOT SUE FOR CONSEQUENTIAL DAMAGES AS THIRD-PARTY BENEFICIARIES OF THE 1963 CONTRACT

Whether presented in the context of sovereign immunity or third-party standing, petitioners' intended beneficiary argument glosses over two critical features of their underlying claim. First, petitioners do not seek simply to enforce the Bureau's promises to the District in the 1963 contract, but to obtain monetary compensation for their *own* claimed resulting losses. Indeed, petitioners argue (as a point supposedly in their favor) that the District itself could not have sued the Bureau for petitioners' consequential damages. Pet. Br. 45 & n.54; Pet. 24-25 & n.31. Second, petitioners seek to sue upon

a *government* contract, executed pursuant to the federal reclamation laws. Unlike a simple commercial contract for the sale and delivery of a commodity, government contracts in general, and reclamation contracts in particular, confer valuable benefits on many segments of the public. If each beneficiary were entitled to sue for consequential lost-profit damages not available to the promisee itself, the government would be exposed to a multiplicity of suits and financial liability far beyond expectations, undermining the fundamental principle that all contracts should be construed to effectuate the contracting parties' intent.[9]

A. A Direct Action For Consequential Damages By A Third Party To A Government Contract Can Only Proceed If Consistent With The Contracting Parties' Intent And The Laws Under Which The Contract Was Executed

Petitioners state that the "proper test" for evaluating intended third party beneficiary status is "whether the parties to the contract intended it to be for [their] direct benefit, so as to entitle [them] to sue." Pet. Br. 23-24 (citing *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912), *Hendrick v. Lindsay*, 93 U.S. 143, 147 (1876)). Certainly the Court's inquiry should focus on the parties' intent, given the axiomatic principle that all contracts should be interpreted to effectuate the parties' intent. *See, e.g.*, Melvin A. Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358, 1375-76, 1385-88 (1992). However, petitioners have not shown that permitting them to sue for contract

[9] We recognize that if a third party's status as intended beneficiary depends in part upon whether the requested relief is consistent with the contract language and structure, that third party might have standing to bring some claims (*i.e.*, specific performance) but not others (*i.e.*, damages other than the promisee's). In the present case, petitioners seek only their own consequential damages, which is the clearest example of a claim beyond the contracting parties' reasonable expectations.

damages would be consistent with the contracting parties' objectives.

In *German Alliance*, this Court held that an individual property owner, whose property was damaged by fire, could not sue for consequential damages as a third-party beneficiary of a contract to supply water to city fire hydrants. 226 U.S. at 230-33. The Court stated as a threshold matter that the third party must, "*at least*, show that [the contract] was intended for his direct benefit." *Id.* at 230 (emphasis added). Because government contracts are often entered "for the benefit of the inhabitants [of the jurisdiction] collectively," the "exceptional privilege" of maintaining a third-party suit should not be available to protect the "incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives." *Id.* at 230-31. As Chief Justice Cardozo similarly explained in rejecting a third-party beneficiary suit for consequential damages for breach of a city water supply contract, "[i]n a broad sense it is true that every city contract, not improvident or wasteful, is for the benefit of the public. More than this, however, must be shown to give a right of action to a member of the public not formally a party." *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 897 (N.Y. 1928).

This Court in *German Alliance* particularly focused on plaintiff's damages claim in concluding that third-party remedies would be inconsistent with the contracting parties' intent. 226 U.S. at 231-32. The city's exposure to expanded monetary liability and the risk of multiple suits by different segments of the populace "could not have been[] in contemplation of the parties" given the underlying contract purposes and price terms. *Id.* at 231; *see also id.* at 232 ("the amount of payment would naturally have varied with the risk assumed" had the parties intended the water company to assume the risk of consequential third-party damages). Because the economic burden was disproportionate to the risk

assumed, foreclosing damages liability to third parties was "in accordance with the particular intent of those who made this agreement." *Id.* at 232; *see also H.R. Moch,* 159 N.E. at 897-98 ("An intention to assume an obligation of indefinite extension to every member of the public is seen to be the more improbable when we recall the crushing burden that the obligation would impose."); Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. at 1375-76.[10]

---

[10] The fact that the property owner in *German Alliance* could not have maintained an action for damages against the city as promisee, *id.* at 232-33, is consistent with the efficiency rationale for permitting third-party contract enforcement. Allowing a third party to sue the promisor directly promotes the contracting parties' intent "with the least amount of litigation" if the third party could have sought that relief from the promisee, who in turn could have sought it from the promisor. Arthur L. Corbin, *Corbin on Contracts* §775 at 729 (1952); *Restatement (Second) of Contracts* ("Restatement") §313(2)(b) (1979).

That rationale is absent where, as here, the third party could not sue the promisee for its requested damages. Under the District's "Terms and Conditions for Agricultural Water Service," http://www.westlandswater.org/aboutwwd/regs0.htm (Jan. 14, 2002) (last visited Jan. 4, 2005) ("Terms"), it appears that petitioners could not have obtained damages from the District itself. Those Terms, to which agricultural water users agree "[b]y applying for or taking delivery of agricultural water from the District," *id.* ¶25, disclaim any liability for shortages resulting from causes "beyond the District's reasonable control," *id.* ¶3, and provide that the District has the right to establish the water charges and to include in those charges the District's costs of its repayment obligation to the Bureau and any charges pursuant to the CVPIA:

> Charges for agricultural water . . . shall include District operation and maintenance costs and any other costs determined by the Board to be payable as part of the water charges, including components established for the payment of all or a portion of the District's annual repayment obligation to the United States, administrative fees, and land-based charges. *The water charges shall also include the applicable water rates required pursuant to the Reclamation Reform Act of 1982, the Central Valley Project Improvement Act of 1992, and the Judgment in Barcellos and Wolfsen, Inc., et al. v. Westlands Water District, et al.*, and *Westlands Water District, et al. v. United States, et al.*, ...

Id. at ¶8 (emphasis added). These Terms nowhere cap allowable water charges.

Petitioners cite state court cases from Florida and Alabama that permitted property owners to sue as intended beneficiaries under a city's water supply contract. Pet. Br. 41 n. 48. But one of those cases predates *German Alliance* and the other ignores it. Moreover, neither applies the principle, established under federal common law by *German Alliance* and echoed in the Restatement, that the crucial inquiry in government contract cases is whether allowing the third party's consequential damages would implement the contracting parties' intent.[11]

Petitioners assert that they are not simply members of the public, but have a unique relationship with the District, which acts not as an ordinary governmental entity but as their "surrogate." Pet. Br. 44. The factual record and history of litigation between petitioners and the District belies petitioners' contention that the District is a passive instrument of their interests, rather than a political subdivision whose varied

---

[11] The Restatement explains that third-party beneficiary principles governing private contracts apply to "contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach." Restatement §313(1). Where a beneficiary to a government contract sues "for consequential damages resulting from performance or failure to perform," the suit may only proceed if "(a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach." *Id.* §313(2). *See Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947) (where "Congress has not adopted a different standard," this Court applies "to the construction of government contracts the principles of general contract law" set forth in its prior decisions and sources such as the Restatement).

constituents have diverse and often competing concerns. *See supra* at 11; WER 305.[12] Nor does petitioners' erroneous characterization of the District as a private rather than governmental entity diminish the public nature of the 1963 contract, because that contract is also with the Bureau, an agency of the United States government that is charged with serving a varied constituency in implementing a broad range of reclamation, flood control, recreation, and environmental mandates. *See German Alliance*, 226 U.S. at 231 ("every citizen has [interest] in the performance of every . . . contract made by and with the government under which he lives"). The federal reclamation program's purposes extend far beyond providing irrigation to specific lands covered by water delivery contracts. While petitioners may derive economic benefit from the federal reclamation program, they merely form one subgroup of one instrumentality for accomplishing one of Congress' objectives—which also include promoting navigation, flood control, and family farms, and protecting fisheries and water quality. *See, e.g.*, Act of August 26, 1937, ch. 832, §2, 50 Stat. 844, 850; CVPIA, Pub. L. No. 102-575, §3406(a), 106 Stat. 4706, 4714; *Federal Reclamation Law*, §120.1 at 210; *supra at* 2-4. Given the broad statutory purposes underlying the 1963 contract, petitioners cannot establish intended beneficiary status based simply on the fact that petitioners' farmlands receive supplemental CVP water, particularly because, as shown below, allowing petitioners to sue for their unique consequential damages would hamper Congress' reclamation policies and

[12] *See also* Westlands Water District, "*District Description*," *available at* http://www.westlandswater.org/aboutwwd/distdesc1.htm (last visited Jan. 4, 2005) (the District provides water to many agricultural water users in addition to petitioners, and its contract permits delivery to municipal and industrial water users).

would be inconsistent with the limitations on liability set forth in the 1963 contract.[13]

[13] *See Federal Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 87-89 (1958) (government contracts should be construed against the backdrop of the authorizing statute's policies); *see also Martinez v. Socoma Cos.*, 11 Cal.3d 394, 402 n.2, 406 (1974) (disadvantaged individuals could not seek consequential damages as third-party beneficiaries to federal contracts with businesses to provide job training and to employ disadvantaged individuals because contracts "were designed not to benefit individuals as such but to utilize the training and employment of disadvantaged persons as a means of improving the East Los Angeles neighborhood"); *Gonzalez v. City of Mission*, 620 S.W. 2d 918, 922 (Tex. App. 1981) (homeowners could not sue for damages as third-party beneficiaries of grant disbursement contract between the City and HUD which "clearly shows that it was designed to assist a broad class of people, not just one individual family"); *Chancellor Manor*, 331 F.3d at 901 (owners of low-income housing projects were not intended beneficiaries of government's mortgage guarantee contract with lenders: "The primary, direct beneficiary of the Insurance Commitment was the public").

Petitioners assert that individuals served by "special or limited government units" may sue as third-party beneficiaries to such entity's contract with the government. Pet. Br. 44 n. 51. The cases they cite, however, involve contracts between Indian Tribes and the federal government and do not support petitioners' assertion. In *Busby School of Northern Cheyenne Tribe v. United States,* 8 Cl. Ct. 596 (1985), and *Hebah v. United States*, 428 F.2d 1334 (Ct. Cl. 1970), individual tribe members were permitted to sue the federal government under its contracts with their Tribes, but those plaintiffs had a special connection to their Tribe as promisee and a unique relationship with the federal government as promisor which petitioners here lack. In *Carlow v. United States,* 40 Fed. Cl. 773 (Ct. Cl. 1998), a construction contractor that had executed a contract with a Tribe was permitted to sue the federal government for unpaid services as third-party beneficiary to a contract between the Tribe and the federal government because the contract manifested the parties' intent that "the United States []satisfy the legitimate debts and obligations of the Tribe to contractors who performed compensable work on the road construction project." *Id.* at 783.

B. Allowing Third-Party Damages Claims Against The United States Is Inconsistent With Federal Reclamation Policy

Under the original 1902 reclamation program, individual water users filed "water right applications" with the Bureau which, once approved, established a direct contractual relationship between the user and the Bureau. *See* H. R. Rep. No. 67-662, at 6 (1922). Congress subsequently concluded that this system of direct contracting created undue financial risk and administrative complication, and amended the Reclamation Act to authorize the Bureau to contract instead with irrigation districts, state-created governmental bodies with tax-setting power. Act of May 15, 1922, ch. 190, §1, 42 Stat. 541, 43 U.S.C. §511; H. R. Rep. No. 67-662, at 1; *see* Cal. Water Code §§20500 *et seq*. Congress intended thereby to provide "better security" for the government's investment, by insulating the United States from the consequences of individual user defaults (because the district as contracting entity would remain liable for its contract obligations) and from the administrative burden of interacting with individual water users.[14] In 1926, Congress completed the transformation of

[14] H. R. Rep. No. 67-662, at 1 ("The United States will have better security for the money expended in the construction of reclamation projects. Instead of the individual obligation of the water users, the Government will have the obligations of legally organized irrigation districts, being municipal corporations possessing the power to assess and collect taxes on all of the lands within the district."); 62 Cong. Rec. at 3574 (1922) (Rep. Kinkaid) (by contracting with districts, "the security of the Government for the amount due it is materially increased"); *id.* (Rep. Hayden) (contractual obligation of entire district to pay government "is vastly better security for the repayment of the sums due to the United States than the individual obligations of water users"; "the enactment of this bill provides a means whereby there will be less risk of the loss of any part of the money expended out of the reclamation fund"); *id.* at 3575 (Rep. Mondell) ("There are difficulties that arise from the collection of the charges from the individual."); *id.* at 3578 (Rep. Sinnott) ("if anybody defaults in his payment," the entire district will remain liable); *id.* at 3580 (Rep. Dempsey) ("the Government is [not] going to collect from these individuals with the ease, with the certainty, or in the amount that it will collect from the irrigation districts"); *id.* at 5859 (Sen. McNary) ("The security is very much better because the Government is dealing with organized irrigation districts rather than the various individual entrymen who take water in the projects."). The population living on lands irrigated by reclamation projects increased by more than 25% from 1918 to 1922. *See* S. Doc. 68-92, at 92 (1924). Congress' concerns about the risks and burdens of direct contracting are only heightened today, given the vast numbers of individual water users. The Bureau reports that in 1992 the CVP supplied irrigation water to almost 22,000 farms. Bureau of Reclamation, Central Valley Project Data, http://www.usbr.gov/dataweb/html/mpcvpprjdata.html (last visited Jan. 4, 2005)

the reclamation contracting regime by requiring, and not merely authorizing, the Bureau to contract with irrigation districts rather than individual water users. Omnibus Adjustment Act of 1926, ch. 383, §46, 44 Stat. 636, 649, 43 U.S.C. §423e.

Construing the 1963 contract to allow individual water users to sue the Bureau for consequential damages is inconsistent with the purpose of these amendments—and thus not likely what the contracting parties intended. Permitting third-party contract actions would effectively reintroduce the old regime of direct contractual relationships, burdening the Bureau by eliminating its reciprocal right of enforcement (which had allowed the Bureau to sue water users for their alleged breaches) while subjecting the federal government to consequential damages liability that would dwarf the financial risk that Congress had previously found intolerable.

Allowing direct contract enforcement rights would also undermine the efficient administration of the reclamation laws and would invite a multiplicity of litigation. The number of third-party beneficiaries who could bring contract damages actions under petitioners' theory potentially includes all individuals with any alleged contractual or state law property "right" to water. *See, e.g.*, Pet. Br. 40-41. Within the

District alone, this group includes all those with an interest in one or more of the 600 farms that the District asserts it serves.[15] Each of these purported "rightholders" could potentially sue for different relief, at different times, in different courts, against different defendants.[16]

As this case illustrates, individual landowners within a water district may assert a right to sue when the district itself would not, urging their own interests at the expense of the interests of the district or other landowners or water users. Allowing individual landowners to sue, after the district itself concludes that litigation would be unwise or unnecessary, would necessarily interfere with the district's ability to balance competing interests of water users within its boundaries

[15] Westlands Water District, "*Who We Are*," *available* at http://www.westlandswater.org/wwd/aboutwwd/aboutwwd.asp (last visited Jan. 4, 2005) ("*Who We Are*").

[16] It is not clear who, precisely, would have water "rights" under petitioners' theory. Petitioners describe the purported rightholders as "farmers," "water users" or "landowners," but those terms are not interchangeable. Farming operations on land receiving reclamation project water are often conducted by entities other than the landowners. *See* 43 CFR §428.3 (defining "farm operator" as "an individual or legal entity other than the owner, lessee, or sublessee that performs any portion of the farming operation"). If petitioners would vest "rights" in individuals who apply the water *or* who own the land, many individuals and entities would have competing claims to the "same" water. If, however, petitioners would impose both application and ownership requirements, individual homeowners who tend a backyard garden could qualify as "rightholders" while some petitioners would not. Petitioners Edwin R. O'Neill and his family, for example, "own *or* operate approximately 7,900 acres of farmland within Area I of the Westlands Water District." Dist. Ct. Docket No. 487 (Jan. 11, 1996), Supp. Decl. of Edwin R. O'Neill at ¶3 (emphasis added). Nor is it clear what constitutes "ownership" under petitioners' argument—whether it extends only to owners in fee simple, or whether ownership interests could be asserted by any individual with some kind of state law property interest (for example, a mortgagor or an individual with a future interest)—again, potentially resulting in competing claims by different individuals and entities.

and to advance its own governmental goals. Moreover, because of the risk of collateral estoppel, allowing individual litigation could compel intervention by all water districts and users who claim an interest or priority. *See supra* at 11 & 12 n. 5. And of course, petitioners' approach would subject the federal government to a multiplicity of litigation, increasing transaction costs, risking inconsistent judgments, and reducing the government's incentive to enter into master settlement agreements such as the Delta Accord, or *any* settlement, that could be collaterally attacked by individual water users. The threat of endless litigation by individual water users at different times in different courts asserting different theories based on different contract provisions cannot be reconciled with Congress' intent to insert water districts as an intermediary between the federal government and individual water users.

C. Allowing Third-Party Damages Claims Against The United States Is Contrary To The Contracting Parties' Intent As Manifested In The 1963 Contract

The language and structure of the 1963 contract provide further compelling evidence that the contracting parties did not intend to permit petitioners to sue for their own consequential damages.

1. *A Direct Action By Petitioners Against The United States Is Inconsistent With The Exclusive Exchange Of Performance Obligations Between The Bureau And The District*

Under the contract, the Bureau delivers supplemental water to the District, which in turn makes deliveries to individual water users. Art. 3 at JA 34-36; "*Who We Are*," *supra* n. 15. The Bureau does not furnish any water directly to these individual water users. Rather, once it delivers water to the District's central delivery points, its performance obligations end and the contract explicitly absolves it of any subsequent

liability. *See* Art. 9(c) at JA 40-41("The United States shall not be responsible for . . . claim of damage of any nature whatsoever . . . arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such water beyond such delivery points").

On its face, the contract gives individual water users no right to receive water under the contract, even upon fulfillment of their payment obligations, independent of the District's own contract rights. Although the District delivers the water and charges individual water users through taxes and assessments, *see* Art. 16 at JA 46, the District remains obligated to pay the United States even if one or more individual water users fail to pay the District: "The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District." Art. 14 at JA 45. Further, any default by individual water users causing the District to fail to meet its payment obligations bars deliveries of any water to all water users in the District, even those that fully satisfy their own payment obligations. *See* Art. 17 at JA 46 ("No water shall be furnished to the District or by the District to or for the use of any lands or parties therein during any period in which the District may be in arrears."). In short, individual water users have no separate or independent rights from the District under the 1963 contract.

The only provision in the 1963 contract that acknowledges potential rights in third parties is Article 31, the assignment provision, which states: "The provisions of this contract shall apply to and bind the successors and assigns of the respective parties." JA 55. This language demonstrates that when the parties intended to vest their enforcement rights in third parties, they knew how to do so. Article 31 further states that "no assignment or transfer of this contract or any part thereof

or interest therein shall be valid until and unless approved by the United States." *Id.* Like the provisions making the District and the Bureau solely responsible for contract compliance, this language reflects the parties' intent to limit third-party enforcement rights only to those successors and assigns who are explicitly "approved" by the United States. Petitioners have not been assigned rights under the contract, Pet. App. 14a n.4, nor could they have been under the 1926 Reclamation Act amendments, which prohibit the Bureau from entering into reclamation contracts with individual water users. *See supra* at 30-31.[17]

2. *A Direct Action By Petitioners Against The United States For Consequential Damages Undermines The Parties' Intent To Limit The Bureau's Contract Liability*

Several contract provisions explicitly limit the Bureau's potential liability and thereby reflect the parties' intent not to subject the Bureau to potentially massive third-party consequential damages liability. As noted above, the contract includes an explicit no-liability-after-delivery clause, which protects the Bureau from liability for acts or omissions arising after the Bureau has delivered reclamation water to the District's designated "delivery points." *See* Art. 9(c) at JA 40-41. Individual water users of course, receive their water only after it has been delivered to the District; and their claim for damages resulting from post-delivery taxes, assessments,

---

[17] Petitioners quote the contract language that the right to an "adjustment" in the event of water shortages or apportionment shall be the sole remedy of the District or anyone claiming "by, through, or under the District." Pet. Br. 30 (citing Art. 9, 11). But in the context of the contract as a whole and given the contract's structure and purposes, that restriction on remedies must logically refer to a successor or assignee of the District that has been approved by the United States under Article 31. *See* Pet. App. 13a-14a. The language may also permit CVPIA-based water transfers, which were authorized after the 1963 contract. *See infra* at n. 27.

and distribution cannot be reconciled with this limitation on liability.

Further, as the Ninth Circuit concluded in *O'Neill*, 50 F.3d at 682-84, the contract broadly immunizes the Bureau from liability for any damage arising out of any water shortages. *See* Art. 11(b) at JA 42 ("in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes."). The contract also specifies that the *exclusive* remedy for any water shortages is an "adjustment," that is, an elimination of any charges for the undelivered water. *See* Art. 7 at JA 39 (defining "adjustment"); 11(b) at JA 43 ("To the extent of such deficiency, such adjustment shall constitute the sole remedy"). If the District were itself bringing this case, the relief sought by petitioners would be expressly barred by the terms of the contract. Petitioners should not be able to assert greater rights than could the District, as the contracting party. *See United Steelworkers v. Rawson*, 495 U.S. 362, 375 (1990) ("third-party beneficiaries generally have no greater rights in a contract than does the promisee"); Restatement §309(c), comment b ("Where there is a contract, the right of a beneficiary is subject to any limitations imposed by the terms of the contract. Such a limitation may be imposed by the agreed terms, or it may be imposed in the absence of contrary agreement by virtue of considerations of fairness and public policy."). Petitioners offer no justification for their remarkable inference that the contracting parties *implicitly* granted to water users the very right they *expressly* denied to the District—the right to sue the United States for contract damages.

The contract's fixed price over its 40-year term provides further indication of the contracting parties' intent to limit the Bureau's potential contractual liability. *See* Art. 6(a) at JA 38. That price term does not rise or fall with the value of the

agricultural land that receives contract water. Nor does it fluctuate with the market for the agricultural products produced on those lands. To permit liability against the Bureau for third parties' consequential damages—particularly if those third parties could seek their own damages in addition to, rather than in place of, any remedy that the District could obtain—would be wholly disproportionate to the financial risk the government assumed in entering into this contract. *See German Alliance*, 226 U.S. at 232 (contract provision establishing fixed price over extended contract period indicates that liability to third parties for consequential damages "was not in the contemplation of the parties. . . . Otherwise the amount of payment would naturally have varied with the risk assumed.").[18]

---

[18] In none of the third-party beneficiary governmental contract cases cited by petitioners (Pet. Br. 24 & n. 37) did plaintiffs seek their own consequential damages (rather than the promisee's) under a contract that limited or eliminated such damages. In *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981), low-income tenants were permitted to enforce a HUD contract with a project owner to provide rent subsidies to plaintiffs in exchange for a HUD-insured or HUD-held mortgage. Plaintiffs merely sought to enforce HUD's promise to give them rent subsidies; they did not seek consequential damages for contractual breach. *Id.* at 1265, 1276. In *Guardsman Elevator* Co. *v. United States*, 50 Fed. Cl. 577 (Ct. Cl. 2001), an elevator service company sued HUD for the cost of the services rendered to a housing project owner that had a contract with HUD. Plaintiff sought to recover only for services rendered to the project owner, not consequential damages for breach of the promise to pay. *Id.* at 579-80. In *Schuerman v. United States*, 30 Fed. Cl. 420 (Ct. Cl. 1994), borrowers were permitted to sue on a loan guarantee agreement between the Farmers Home Administration and a lender, but the contract actually "identif[ied them] as the borrowers of the guaranteed funds." *Id.* at 433. In *Audio Odyssey, Ltd. v. United States*, 255 F.3d 512, 521-22 (8th Cir. 2001), a borrower sued the SBA under a loan guarantee agreement between the SBA and the bank that had seized plaintiff's property. In the opinion cited by petitioners, the Eighth Circuit allowed plaintiff to sue for the SBA's failure to provide written (rather than oral) approval before the seizure, without indicating what damages were requested or whether the

D. Petitioners Have No State Or Federal "Right" To Reclamation Water That Requires A Different Analysis Of Their Third-Party Beneficiary Status

Petitioners contend that they must be intended beneficiaries of the 1963 contract because they "equitably own" and have a "right" to the San Luis Unit water that flows to their land, under the contract, California state water law, and several earlier reclamation cases. Pet. Br. 21, 37-40. Petitioners are wrong as a matter of law, but the Court need not decide the scope of a water user's property rights in this case, because even if petitioners had a property interest in all or part of the *res* of the 1963 contract, that would still not entitle them to sue for consequential damages on the facts of this case.

1. *Ownership Of All Or A Portion Of The Contract Res Does Not By Itself Confer Intended Beneficiary Status*

Petitioners state without meaningful explanation or analysis that their claimed ownership of the water necessary to irrigate their lands "powerfully implies" that they are intended beneficiaries of the 1963 contract. Pet. Br. 40. Even assuming *arguendo* that petitioners owned the interest they

---

contract limited SBA's consequential damages liability in any way. On appeal after remand for factual development, however, the Eighth Circuit affirmed the trial court's dismissal for lack of standing and failure to state a claim, concluding that the SBA owed no contractual duty to plaintiffs. *See Audio Odyssey, Ltd. v. United States*, 373 F.3d 870 (8th Cir. 2004). Finally, in *Airplane Sales Int'l Corp. v. United States*, 54 Fed. Cl. 418 (Ct. Cl. 2002), the Navy contracted to transfer airplane parts to a museum which in turn contracted to sell those parts to plaintiff. Plaintiff was allowed to sue the Navy directly for its alleged failure to provide all parts required by the contract, but plaintiff's damages were presumably identical to those of the museum itself; and because only one individual ultimately received parts under the Navy contract, allowing a third-party suit did not subject the government to an unintended multiplicity of litigation.

claim, however, the analysis stated *supra* at 30-37 demonstrates that the contracting parties did *not* intend them to be able to sue the United States for contract damages. We are unaware of any case holding that mere ownership of the *res* of a contract automatically allows that third-party owner to sue for contract damages. Indeed, many cases deny intended beneficiary status to such owners, particularly in the context of a government contract that furthers important public purposes extending beyond the parochial economic interests of the property owners.[19]

2. *Petitioners Have No Contractual Right To Reclamation Water Under The 1963 Contract*

Petitioners' assertion of a contractual "right" to CVP water raises a merits issue more than one affecting intended beneficiary analysis, but, in either event, is incorrect. The contract provisions they cite, which prohibit distribution of water

---

[19] *See, e.g., Chancellor Manor*, 331 F.3d at 901 (housing project owners were not intended beneficiaries of mortgage guarantee contract with government because "[t]he primary, direct beneficiary of the Insurance Commitment was the public"); *Castle v. United States*, 301 F.3d 1328, 1338 (Fed. Cir. 2002), *cert. denied*, 539 U.S. 925 (2003) (shareholders of savings and loan association could not sue as intended beneficiaries of contract between association and federal government regarding regulatory treatment of association's merger); *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001) (corporate shareholders could not sue as intended beneficiaries of alleged contract between federal government and corporation regarding regulatory treatment of corporation's merger); *see also supra* n. 13.

Petitioners cite only two cases in asserting that their alleged property right is dispositive of the intended beneficiary issue. Pet. Br. 40 n. 47. Both cases involved a contract between two parties to ship a third party's property, and in neither, unlike this case, did the contract manifest an intent either to a benefit a broad array of third parties or to insulate the promisor from consequential damages. Accordingly, allowing a direct action by the lone third party in each of those cases did not turn on the ownership issue and was in no way inconsistent with the contracting parties' presumed contractual intent.

where certain prerequisites have not been satisfied, set *limitations* on the District's prerogative to deliver the water that *it* receives; they do not establish an affirmative right of certain lands or water users to such water. Article 15 merely provides that, as to lands for which payments to the District have *not* been made, "such tract shall have *no* right to any water furnished to the District pursuant to this contract." Art. 15 at JA 45 (emphasis added). Articles 23(a), 24(e), and 25(b), which implement the "excess land" provisions of the Reclamation Act, simply limit the concentration of land holdings and help to spread more widely the benefits of the reclamation program. *See supra* at 2-4. Most importantly, the negative implication that petitioners seek to derive is not supported by the contract as a whole, whose payment and delivery terms make clear that individual water users possess no "right" to receive water, even where they have fulfilled their own payment obligations to the District. *See supra* at 34.

3. *Petitioners Have No State Or Federal Property Right To Reclamation Water*

Petitioners' assertion of a state law property right in future use of CVP water is also legally mistaken. Nowhere do petitioners articulate the precise nature or contours of that supposed right. Moreover, under applicable legal principles, petitioners' rights are entirely derivative of the District's, which are themselves limited by the 1963 contract, by federal statutory mandates, and by state water law doctrines of beneficial use, reasonable use, and public trust. Whatever right petitioners may have to the continued reasonable and beneficial use of CVP water under their agreements with the District, and whatever rights the District may have to such water under its contract with the Bureau, neither petitioners nor the District have any vested property right to a fixed and perpetual quantity of CVP water, regardless of competing statutory, contractual, reasonable and beneficial use, and public trust obligations of the Bureau.

Section 8 of the Reclamation Act, *codified at* 43 U.S.C. §383, states in pertinent part:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

Under the system of "cooperative federalism" established by this provision, the Bureau must administer the reclamation program in compliance with state laws regarding appropriation of water rights, unless those laws are inconsistent with a clear congressional directive. *California v. United States*, 438 U.S. 645, 650, 668 n.21, 678 (1978). The federal reclamation scheme thus recognizes the primacy of *state* law in creating and defining legal rights to reclamation water. *Id.* at 650.

There is no dispute that the United States—rather than petitioners, other end water users, or the water districts—holds the permits and legal right to appropriate the CVP water at issue here and is the legal "water right holder" under California law. WER 232-33; *see* Cal. Water Code §1225. Indeed, California's State Water Resources Control Board ("SWRCB"), the state body in "charge of comprehensive planning and allocation of waters," *see National Audubon Society v. Superior Court*, 33 Cal.3d 419, 444, *cert. denied*, 464 U.S. 977 (1983), held in 2000, after conducting 80 days of hearings and compiling a 128,970 page record, that the United States, not any other entity, "is the water right holder" of the water at issue in this case.[20] The California Superior

---

[20] Implementation of Water Quality Objective for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, California State Water Resources Control Board Revised Decision 1641, 1999 WL 1678482 at *84

Court affirmed that decision in May 2003 after a 16-day trial, reiterating the Bureau's legal title and holding that "persons who use water provided under contract with a water supplier entity, such as the Central Valley Project" were not "legal users" of water and thus not protected from changes in the Bureau's permits.[21]

SWRCB Decision D-1641 rejected the argument that the end users of CVP water are "the water right holders," while reaffirming well-established principles of California water law that long predated the 1963 contract. These principles preclude landowners from obtaining a vested right to use a fixed quantity of water in perpetuity to the detriment of other

(Mar. 15, 2000). SWRCB Decision D-1641 considered, among other things, the Bureau's application to consolidate and change the places and "purposes of use" for the Bureau's then-existing CVP water permits. D-1641 at *80. The Bureau submitted the application to confirm its authority under its state water permits to provide water allocations for fish and wildlife purposes, consistent with the requirements of the ESA. *Id.* at *80-*81. The District objected to the Bureau's application, but the SWRCB rejected the District's "argument that the end users of water are the water right holders" and concluded that the Bureau as legal owner was entitled to change its use of water under state law. *Id.* at *85. The SWRCB thus confirmed that the Bureau was entitled under California law to make the very allocations for fish and wildlife purposes that petitioners challenge in this case.

[21] *State Water Resources Control Board Cases*, Coord. Special Proc. No. JC 4118, Statement of Decision ("Proc No. JC 4118"), at 4-7, 42, 46 (Cal. Superior Ct. May 5, 2003), available at http://www.saccourt.com/CoordCases/swrcb/orders/SWRCBCaseDecision5-5-03.PDF (last visited Jan. 4, 2005). *Accord*, *County of San Joaquin v. State Water Resources Control Board*, 54 Cal. App. 4th 1144, 1156 n.12 (1997), *cert. denied*, 522 U.S. 1048 (1998); *United States v. State Water Resources Control Board*, 182 Cal. App. 3d at 106, 145. Although an appeal from that decision is pending, the California Superior Court is a court "whose decrees are regarded as determinati[ve] of state law" in cases involving water rights. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 753 n. 23 (1950) (citing *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940)).

beneficial, competing demands on the water, such as protection of fish and wildlife.[22]

In 1928, California amended its state constitution explicitly to add reasonableness and beneficial use standards to state water law:

> The right to water or to the use or flow of water in or from any natural stream or water course in the State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

Cal. Const. art. X, §2; *see also Joslin v. Marin Municipal Water Dist.*, 67 Cal.2d 132, 137 & n. 5 (1967); *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 26 Cal.3d 183, 193-97 (1980); Cal. Water Code §100 ("The right to water or to the use or flow of water . . . is and shall be limited to such water as shall be reasonably required for the beneficial use to be served . . ."). Those requirements of reasonable and beneficial use are separate and independent, so "the mere fact that a use may be beneficial . . . is not sufficient if the use is not also reasonable." *Joslin*, 67 Cal.2d at 143. "[W]hat is a reasonable use of water depends on the circumstances of each case" in light of "statewide considerations of transcen-

[22] *See National Audubon*, 33 Cal.3d at 425-26 ("the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and [underlying] lands . . . [and to] bar[] . . . any . . . party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust"); *United States v. SWRCB*, 182 Cal. App. 3d at 106 (state possesses "police power . . . to regulate the use and enjoyment of water rights for the public benefit"); *People v. Glen-Colusa Irrig. Dist.*, 127 Cal. App. 30, 36 (1932) (affirming injunction against irrigation district's operation of pumps that killed large numbers of fish); Brian E. Gray, *The Property Right in Water*, 9 Hastings W.-N.W. J. Envtl. L. & Policy 1, 9 (2002).

dent importance," including "the ever increasing need for the conservation of water in this state." *Id.* at 140. Under these principles of California law, any allocation of CVP water to petitioners was necessarily subject to ensuring the reasonable and beneficial use of that water, taking into account protection of public trust resources such as fish and wildlife. *See, e.g., National Audubon*, 33 Cal.3d at 443; Cal. Water Code §1243 ("The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water . . . .").

Petitioners' claimed "equitable" right to a consistent flow of water also rests upon the erroneous assertion that the Bureau holds legal title to the CVP water in trust for the landowners who apply the water to their lands. That "trust" theory, however, derives from an aspect of *Ivanhoe Irrig. Dist. v. All Parties and Persons,* 47 Cal.2d 597 (1957) ("*Ivanhoe I*"), that was explicitly disavowed by the California Supreme Court in *Ivanhoe Irrig. Dist. v. All Parties and Persons,* 53 Cal.2d 692, 716 (1960) ("*Ivanhoe II*"). Petitioners' trust theory was also rejected by the SWRCB in Decision D-1641 and by the Superior Court in affirming that decision. Proc. No. JC 4118, at 47-48.[23]

[23] As *Bryant v. Yellen*, 447 U.S. 352 (1980), recognized, to the extent *Ivanhoe II* acknowledged any state prescription on water allocations to landowners, that prescription arose from a narrow state statute prohibiting discriminatory allocations (which is not applicable here). *See id.* at 371 n.23. Any trust relationship recognized today under California law is a trust benefitting all people of the state, not particular landowners, as the SWRCB has concluded. D-1641, 1999 WL 1678482 at *83; *see also National Audubon,* 33 Cal.3d at 441 ("public trust . . . is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands"); *compare Ivanhoe I*, 47 Cal.2d at 620. In any event, the landowners in *Bryant* appear to have obtained their water rights long before the Bureau took over the delivery and distribution of the water and long before California's present water appropriation rules and Cal. Const. art. X, §2 were adopted. *Bryant*, 447 U.S. at 357-58 & n.4; *Arizona v. Colorado*, 373 U.S. 546, 552-53 (1963).

Any right petitioners may have to the use of CVP water arises from, and can be no greater than, the District's right to water under the 1963 contract.[24] Before the execution of the 1963 contract (and until the project became operational), petitioners and their predecessor Area I landowners received no supplemental CVP water. The Bureau later provided reclamation water to the District under the 1963 contract, but subject to the terms of that contract, including: the "beneficial use" limitation, *see* Art. 3(f) at JA 36; the provision limiting the District to a pro-rata share of water that is "available," given the government's competing contractual commitments, *see* Art. 11(a) at JA 42-43; *Westlands Water Dist.*, 337 F.3d at 1102-03; and the United States' reservation of its right to amend the reclamation laws, *see* Art. 26 at JA 53.

Petitioners' suggestion that they have a right in perpetuity to a fixed quantity of water assumes that their right, although derivative, is greater than the District's right to water under the 1963 contract. Carried to its logical extension, petitioners' "right" could entitle them to continued water delivery beyond the term of the 1963 contract and even if they refused to pay for water received. Not only does the contract create no absolute or unlimited right in the District or any other entity to a fixed quantity of water, but Article 11(a) expressly

[24] As the SWRCB noted in Decision D-1641, "[t]he water right permits held by the [Bureau] . . . recognize that deliveries of water by the [Bureau] to public agencies are subject to the contractual provisions between the [Bureau] and the public agencies." D-1641, 1999 WL 1678482 at *81 n.70; *see also* Cal. Water Code §23200 (right to use water acquired under a reclamation contract to be distributed according to federal reclamation laws and contract provisions); *accord Barcellos*, 849 F.Supp. at 731, *aff'd sub nom., O'Neill*, 50 F.3d 677; *see also* Brian E. Gray, *The Property Right in Water*, 9 Hastings W.-N.W. J. Envtl. L. & Policy at 1, 17.

absolves the United States from any liability from under-deliveries resulting from error, drought, or "*any other causes.*" Art. 11(a) at JA 42 (emphasis added); *see also O'Neill*, 50 F.3d at 689; *United States v. SWRCB*, 182 Cal. App.3d at 148 (contractual immunity provision establishes "substantively and conceptually" that the "contractors cannot justify any reasonable expectation of a certain or guaranteed water supply for delivery"); *Bowen v. Public Agencies*, 477 U.S. 41, 52-54 (1986) (no California property interest in program rights that United States reserved power to modify).

In short, state water law does not create the vested property right that petitioners believe is so central to establishing their status as intended beneficiaries. Any claim to water delivered under the 1963 contract is derivative of the District's right to water under that contract and must yield to the obligation of the United States, the holder of the water right under state law, to allocate CVP water for reasonable and beneficial uses, including fish and wildlife protection, to protect trust resources, and to adhere to statutory mandates of the ESA and CVPIA.

Nor do *Ickes v. Fox*, 300 U.S. 82 (1937), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Nevada v. United States*, 463 U.S. 110 (1983), support petitioners' asserted vested right. Pet. Br. 21. While each of those decisions acknowledged the defining role of *state* water law, none involved *California* water law, which does not confer a vested right to a perpetual water flow or to any set quantity of water. Those cases are also factually distinguishable because in each, the water rights were formally acquired by the water users in their own name from the United States or their respective states—unlike here where the United States acquired the water rights itself and owns legal title to the CVP water under

applicable state law.[25] Because petitioners in this case never perfected legal title to the CVP water or had such right confirmed by court decree, they are differently situated than the claimants in *Ickes*, *Nebraska*, and *Nevada*. Moreover, none of those cases involved the type of contract at issue here, a fixed–term water service contract under 43 U.S.C. §485h(e).[26]

Petitioners' reliance on the proviso to Section 8 of the Reclamation Act is also unavailing. That proviso reiterates the well-established principle, echoed by many states' laws, including California's, that "[t]he right to the use of water acquired under the provisions of this Act shall be *appurtenant* to the land irrigated, and *beneficial use* shall be the basis, the measure, and the limit of the right." 43 U.S.C. §372 (emphasis added). Petitioners read this proviso as creating an independent federal "appurtenancy" rule under which "water rights . . . attach to specific parcels to which water has been beneficially applied," presumably forever. Pet. Br. 40 n.44. However, the appurtenancy proviso establishes a *limitation*

---

[25] In *Ickes*, landowners receiving water from the Yakima Project were required by the Bureau's contract to initiate their own water rights under Washington state law *before* construction of the Project commenced. 300 U.S. at 89. In *Nebraska*, the "state authorities . . . issued decrees and certificates in favor of the individual water users [that] named as appropriators the individual landowners"—again, before the start of construction on the Project. 325 U.S. at 613-14. In *Nevada*, "[b]efore the works contemplated by the project went into operation, a number of private landowners had established rights in the Truckee River under Nevada law." 463 U.S. at 116. Those rights were also confirmed by a court decree that was final and binding on the United States. *Id.* at 113. Each of these cases thus involved individual landowners who obtained water rights under state law *before* their land became part of a federal reclamation project.

[26] The contracts in *Ickes, Nebraska*, and *Nevada* were entered into prior to 1939, when Congress first authorized water service contracts. Reclamation Project Act of 1939, ch. 418, §9(e), 53 Stat. 1187, 1196, 43 U.S.C. §485h(e).

on the use of reclamation water after its delivery, not a guarantee of future flows. Congress included this term not to confer affirmative, prospective rights on landowners—after all, §372 on its face does not create rights, but only limits rights otherwise "acquired under the provisions of the Act"—but to further the anti-monopoly, anti-profiteering goals of the Reclamation Act by preventing subsidized reclamation project water from being separated from the actual land that it irrigated and then re-sold at a speculative profit.[27]

Congress used the term "beneficial use" to limit the permissible uses of reclamation water and to ensure a reasonable accommodation of competing interests. *See, e.g.,* H. R. Rep. No. 57-794, at 8. By making "beneficial use" "the basis, the measure, and the limit of the right [to use reclamation water]," Congress incorporated well-established state law doctrines that imposed limits on the amounts of water available for irrigation or other reclamation purposes. As then-Judge Kennedy explained in *Alpine Land & Reservoir Co.*:

> The legislative history of the 1902 Reclamation Act makes clear that the "principles underlying and governing water rights" under the Act were to be the existing beneficial use concepts of western water law. . . . While there were provisions of federal law which were intended to displace state law, such as the 160-acre limit, . . . *beneficial use itself was intended to be governed by state law.*

697 F.2d at 853-54 (emphasis added) (quoting 35 Cong. Rec. 6677 (1902) (Rep. Mondell) and citing 35 Cong. Rec. 2222 (1902) (Sen. Clark)).

[27] *See* H. R. Rep. No. 57-1468, at 6-7 (1902) ("appurtenancy" language was added to "prevent the possibility of speculative use of water rights."); H. R. Rep. No. 57-794, at 8 (1902); Joseph Sax, *Federal Reclamation Law,* §120.1 at 210 n. 42 ("appurtenance provision" tied "the water to the land" to "prevent[] speculation in water rights as such"); Paul S. Taylor, *Public Policy,* 64 Yale L.J. at 486 ("Early irrigationists had been greatly dissatisfied with dependence on others in control of their water supply, and regarded tying water and land together in common ownership as among the surest of anti-monopoly devices."); *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 858 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983) (citing legislative history) (purpose of proviso was to ensure that "appropriated water [is] applied to irrigation; it cannot be severed as a commodity for use on land to which it would not be appurtenant"). In 1992, Congress amended reclamation law to authorize recipients of CVP water to resell that water to other California water users, subject to specified conditions. *See* CVPIA, Pub. L. No. 102-575, §3405(a), 106 Stat. 4706, 4709.

The California Constitution, California Water Code, and California common law each limit the Bureau's right to water under its state-issued permit by making use of that water subject to the state law doctrines of reasonable and beneficial use and public trust. Those limitations necessarily apply as well to any derivative interests that the District or others may claim in that water. Petitioners' past use of water for irrigation purposes does not confer the future water rights they claim.

E. The *Barcellos I* Judgment Is Irrelevant To Petitioners' Claims

Petitioners finally make a series of spurious arguments based on irrelevant *Barcellos I* documents. First, petitioners quote the *Barcellos I* stipulated judgment, which "acknowledges that [the District] entered into the 1963 contract for the benefit of [Area I] and the lands therein." JA 111; *see* Pet. Br. 46-48; Pet. App. 16a & n.7, 37a-38a. But nothing in that judgment expressed any such acknowledgment by the Bureau, nor would that *post hoc* expression of intent be any more binding than the present position of the two contracting parties that petitioners are not intended beneficiaries. *See Restatement* §302, comment d (requiring "manifestation of intention by the promisee and promisor"). Moreover, in the context of *Barcellos I*—a suit to assert higher priorities over other water users within the District, *see* 491 F. Supp. at 265—this statement merely acknowledges that the Area I landowners were entitled to priority in relation to other water

users, not that the District and the Bureau intended individual landowners to bring direct consequential damages actions under the 1963 contract. Further, because petitioners' present claim seeks consequential damages, they must establish more than an intent by the contracting parties to benefit them generally.

Petitioners next rely on the enforcement clause of the *Barcellos I* stipulated judgment. However, that clause simply authorized the parties to bring a motion or new action "for the *sole* purpose of seeking an order directing the Federal parties to *perform* in accordance with the express terms of this Judgment." JA 110 (emphasis added). Petitioners here do not seek specific performance, and expressly conceded below that they "are here for money damages retroactively. . . . We are not trying to specifically enforce—perform anything. We are not trying to enforce the judgment." WER 239.

Finally, petitioners argue that the stipulated judgment itself constitutes a contract under §390uu. However, petitioners do not seek to enforce that judgment in this case. Besides, ¶23 of that judgment provides: "Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 [Reclamation Reform] Act." Pet. App. 16a; JA 146. Section 203(a) of that Act, which is codified at 43 U.S.C. §390cc, states that "[t]he provisions of this title"—which include 43 U.S.C. §390uu (enacted as Section 221 of the 1982 Act)—apply to districts that have entered into or amended one of the types of "contract[s]" designated in §390cc. By specifying that the judgment does not constitute a "contract" within the meaning of §390cc, the judgment made §390uu inapplicable to its enforcement.

CONCLUSION

For the reasons stated, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

PHILIP F. ATKINS-PATTENSON
SHEPPARD, MULLIN, RICHTER
& HAMPTON, LLP
4 Embarcadero Center, Suite 1700
San Francisco, CA 94111
(415) 434-9100

Attorneys for Intervenors-Respondents

HAMILTON CANDEE
MICHAEL E. WALL
NATURAL RESOURCES DEFENSE
COUNCIL
111 Sutter Street, 20th Floor
San Francisco, CA 94104
(415) 875-6100

Attorneys for Intervenors-Respondents Natural Resources Defense Council et al.

MICHAEL RUBIN
Counsel of Record
LINDA LYE
ALTSHULER, BERZON,
NUSSBAUM, RUBIN
& DEMAIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Attorneys for Intervenors-Respondents